ABRIC PROJECT MANAGEMENT SDN BHD A

v.

PALMSHINE PLAZA SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR B
RAMLY ALI J
[COMPANIES (WINDING-UP) NO: D5-28-311-1999]
30 NOVEMBER 2006

COMPANY LAW: *Winding up - Liquidator - Sale of land by liquidator - Setting aside - Application for - Power to sell - Whether liquidator empowered to sell property - Companies Act 1965, s. 236(2)(c) - Whether court sanction required prior to sale - Companies Act 1965, 236(1) - Whether sale of land grossly undervalue - Whether liquidator had capacity to enter a sale of said land - Companies Act 1965, s. 228(a) - Legal title not vested in liquidator prior to sale - Whether there was necessity to vest title of property - Whether second respondent a bona fide purchaser for valuable consideration - Issue of non filing and proof of debt - Whether irrelevant and misplaced - Whether applicant failed to establish sufficient prima facie case against liquidator - Whether interference of court warranted - Balance of justice - Whether against setting aside sale of land - Whether applicant aggrieved by decision of liquidator* C D E

COMPANY LAW: *Winding up - Liquidator - Duties and responsibilities - Power to sell - Whether liquidator empowered to sell property - Companies Act 1965, s. 236(2)(c) - Whether authority of court required - Companies Act 1965, s. 236(1) - Conduct of liquidator - Whether reasonable and bona fide in searching for best price for land - Whether liquidator had capacity to enter a sale of said land - Companies Act 1965, s. 228(a) - Legal title not vested in liquidator prior to sale - Whether there was necessity to vest title of property - Whether second respondent a bona fide purchaser for valuable consideration – Issue of non filing and proof of debt - Whether irrelevant and misplaced - Whether applicant failed to establish sufficient prima facie case against liquidator - Whether interference of court warranted - Balance of justice - Whether against setting aside sale of land - Whether applicant aggrieved by decision of liquidator* F G H

I

LAND LAW: *Charge - Sale of land - Setting aside - Application to set aside sale of land by liquidator - Power to sell - Whether liquidator empowered to sell property - Companies Act 1965, s. 236(2)(c) - Whether court sanction required prior to sale - Companies Act 1965, 236(1) - Whether sale of land grossly undervalue - Whether liquidator had capacity to enter a sale of said land - Companies Act 1965, s. 228(a) - Legal title not vested in liquidator prior to sale - Whether there was necessity to vest title of property - Whether second respondent a bona fide purchaser for valuable consideration - Issue of non filing and proof of debt - Whether irrelevant and misplaced - Whether applicant failed to establish sufficient prima facie case against liquidator - Whether interference of court warranted - Balance of justice - Whether against setting aside sale of land - Whether applicant aggrieved by decision of liquidator*

This grounds of judgment were in respect of the notice of motion (encl. 37) filed by one Ong Weng Seng @ Ong Say Lan ('applicant') a contributory and former director of the first respondent (the company under liquidation). The applicant sought the following prayers: (a) an order that the sale of a piece of land in Section 8 Petaling Jaya ('the land') by the liquidator to Idaman Harmoni Sdn Bhd (the second respondent) be set aside; and (b) alternatively, that the applicant be given leave to commence proceedings to set aside the sale of the said land. The background facts were that the first respondent was a company incorporated in Malaysia and was in the principal activity of property development. On 27 July 1999, the first respondent was wound up by this court, pursuant to a winding up petition presented by Abric Project Management Sdn Bhd ('petitioner') in respect of a debt of RM2,000,000. Pursuant to the winding up order, one Lim Tian Huat was appointed as the liquidator over the first respondent ('the liquidator'). The first respondent had no assets of realizable value at the date of the winding up order other than two pieces of immovable properties, one of which was the said land. The said land was subject to a registered legal charge in favour of HSBC totaling RM33,000,000 as security for a term loan facility of RM28,000,000 and an overdraft facility of RM5,000,000 granted by HSBC to the first respondent. On 3 August 1999, the liquidator notified the applicant of his appointment and requested for the applicant to furnish the statement of affairs, which was not provided. The liquidator began the process of realizing the assets of the first respondent by taking steps to sell the properties. Eventually, on or about 3 June 2003,

the said land was sold to the second respondent for the purchase price of RM17,900,000. The sale and purchase agreement ('SPA') for the sale and purchase of the said land became absolute and binding upon the first respondent on 27 August 2003. The sale and transfer was eventually completed on or about 24 November 2003 wherein the discharge of charge was released by HSBC in return for the payment of the full RM17,900,000 directly to HSBC. The said land was registered in the second respondent's name on 27 November 2003. On 27 December 2005, encl. 37 was filed by the applicant. The applicant attempted to challenge the sale by the liquidator of the said land on six alleged grounds, namely: (a) the said land was subject to a charge, therefore the liquidator had in law no power to sell; (b) the authority of the court had to be obtained under s. 236(1)(c) of the Companies Act 1965 to effect the sale of the said land; (c) the sale of the said land was grossly undervalue; (d) pursuant to s. 228(a) of the Companies Act 1965, the liquidator had no capacity to enter into a sale of the said land; (e) the transfer of the said land was defective and/or void as the legal title was not vested in the liquidator prior to the sale; (f) the second respondent was not a *bona fide* purchaser for valuable consideration; (g) HSBC ought to have surrendered its security over the said land and filed a proof of debt.

Held (dismissing encl. 37 with costs):

(1) The appointed liquidator took control of the respondent pursuant to a winding up order and was tasked with statutory duties and responsibilities to wind up the first respondent and dissolve the first respondent. In doing so the liquidator would have to realize its assets to obtain proceeds to repay its creditors. The sale of the said land was therefore pursuant to such duties and responsibilities. In accordance with the abovementioned duties, the liquidator was empowered to sell property belonging to the first respondent and this was entrenched in s. 236(2)(c) of the Companies Act 1965 which also dispelled any doubt as to whether the sale could be done by the liquidator by way of a private treaty and/or whether the liquidator must obtain court sanction before proceeding. Clearly, the liquidator could do so without having to obtain court sanction prior to the sale.

A The position remained unchanged even if the property were to be subject to a registered charge. The liquidator could still sell the property, but always subject to the rights of the chargee (HSBC). (paras 42 & 43)

B **(2)** The sale transaction in the present case could not amount to a compromise or arrangement as envisaged under s. 236(1) of the Companies Act 1965. First, HSBC was not in the same position as that of all the other creditors under the liquidation. Instead, HSBC was a secured creditor; in C that HSBC held a registered charge over the said land and therefore took priority over the proceeds from its sale. Secondly, cl. 4 of the sale and purchase agreement with regards to the payment of the purchase price did not in any way imply a compromise. The said land was subject to a D charge in favour of HSBC totaling RM33,000,000 as security for facilities rendered to the first respondent by HSBC. Before the said land could be sold free of encumbrances, a discharge of charge would have to be given by HSBC. Payment of the purchase price proceeds directly E to HSBC was the only way in which HSBC would consent to the sale. The sale was conducted within the powers extended in s. 236(2)(c) of the Companies Act 1965, wherein prior court sanction was not required. The liquidator opted to perform the sale and he was empowered to do so F under s. 236(2)(c) of the Companies Act 1965 as long as he had HSBC's consent. Therefore this ground could not support the applicant's application in encl. 37. (paras 48 & 51)

G **(3)** The conduct of the liquidator was not unreasonable or absurd. Instead, it was in line with the circumstances faced at that material time. The liquidator was at all material times acting reasonably and *bona fide* in searching for the best price obtainable for the said land under the circumstances. It was H for the applicant to satisfy this court with credible and concrete evidence that the liquidator was unreasonable of his action or he was acting in a manner in which no reasonable liquidator could act; if the applicant failed to do so, the court ought not exercise its power to interfere. I (paras 65 & 66)

(4) Lack of provision of the security deposit was a mere omission and was capable of validation by this court pursuant to s. 355 of the Companies Act 1965 and/or r. 194 of the Companies (Winding-up) Rules 1972. No substantial injustice was caused to the first respondent or the applicant by virtue of this omission. Further, the liquidator had just filed the liquidator's fourth affidavit in reply wherein it was provided that the official receiver had just issued the 'certificate that liquidator or special manager has given security' in Form 21 confirming that the security deposit had been duly paid. The official receiver therefore did not wish to penalize the liquidator under r. 48 of the Companies (Winding-up) Rules 1972. (para 71)

(5) The legal title of the property remained with the respondent and was not affected by its winding up. Thus there was no necessity to vest the title of the property which was already in the name of the respondent. The said land was registered, at all material times, in the name of the first respondent. The sale and purchase agreement was therefore entered between the first respondent and the second respondent. The liquidator signed the said agreement (SPA) in his capacity as liquidator appointed over the first respondent *ie*, as agent of the company and not in his personal capacity. The sale was conducted under s. 236(1)(c) of the Companies Act 1965. (paras 73 & 74)

(6) The contention that the second respondent was not a *bona fide* purchaser for valuable consideration was without merit and therefore unsustainable. Nowhere did the applicant justify why the payment by the second respondent did not amount to 'valuable consideration'. Payment of the full purchase price could not be disputed and HSBC itself recognized the receipt of an amount of RM17,900,000 and released the discharge of charge. Further, this court could not agree with the contention that the second respondent was not a *bona fide* purchaser because the second respondent was a related party. At all material times, the fact that the second respondent was indirectly related to the first respondent was never concealed. In turn, the requisite announcements were made and the necessary approvals and waivers were obtained from the relevant regulatory bodies. Full disclosure had been given to Bursa Saham Malaysia

concerning the connection and shareholding between the shareholder of the first respondent and the second respondent. The Bursa Saham Malaysia had exempted the second respondent from complying with the usual requirements of obtaining approval at a shareholders meeting. Also, the liquidator entered into the sale and purchase agreement for the respondent as vendor. The director concerned had not been involved with the deliberations in the proposed acquisitions. The applicant's submission on related party transactions was a red herring. (paras 78, 79, 81 & 82)

(7) The applicant was under a mistaken understanding of HSBC's position in the liquidation. HSBC was a secured creditor and was not obliged to submit a proof of debt (even when called upon to do so by the liquidator) if he relied upon his security for payment. He need only submit his proof of debt if he gives up his security and proved for the whole debt or if he decided to prove for the unsecured portion. There was no mandatory requirement for a secured creditor to come under the liquidation. (para 84)

(8) As the legal owner of the property, the respondent had the capacity to enter into the sale with the purchaser through the liquidator. There was no necessity for HSBC to surrender the security to the liquidator as contended by the applicant, before the liquidator could deal with the property. Accordingly, the parties to the sale agreement agreed that the purchase price which turned out to be an amount lesser that the debt owing by the first respondent to HSBC, to be paid to HSBC to secure the discharge of the chargee. HSBC was and is entitled as of right to the redemption sum as the chargee and secured creditor of the property. The redemption sum had to be and was paid to HSBC in consideration of them giving up their security. It would thus be seen that the issue of non-filing of the proof of debt raised was irrelevant and misplaced. (paras 86 & 88)

(9) No reasons have been proffered by the applicant to explain a delay of almost one and a half years. Such a delay would in itself be grounds to refuse encl. 37. The liquidator was dependent on the approval of HSBC in the sale of the said land. The fact that the said land was leasehold land

exacerbated the issue, calling for the said land to be sold as soon as possible. The decision was made and the SPA was signed with the consent of HSBC. It was therefore unreasonable for the applicant to begin to question and interfere with that decision with hindsight. (para 96)

(10) The applicant had failed to establish a sufficient *prima facie* case against the liquidator to warrant interference of the court in the sale of the said land. Therefore the alternative prayer in encl. 37 for leave to commence proceedings to set aside the sale of the said land could not be granted. The applicant had also failed to establish that the liquidator had not exercised his discretion *bona fide* or that he had acted in a way in which no reasonable liquidator could have acted. (paras 97 & 98)

(11) The balance of justice of the case was against the setting aside of the sale of the said land. It would not be possible to return the said land to its original state in light of the ongoing development construction by the second respondent. Further, there would be a devastating carry-over effect upon the interests of not only the second respondent but also approximately 164 purchasers of units in the new development. Further, the applicant failed to establish that he was aggrieved by the decision of the liquidator in selling the said land at RM17,900,000. (para 98)

Case(s) referred to:

Ayerst v. C & K (Construction) Ltd [1976] AC 167 ***(refd)***

Chi Liung Holdings Sdn Bhd v. Ng Pyak Yeow [1995] 4 CLJ 11 CA ***(refd)***

Chin Ah Keow v. Anggun Pintas Sdn Bhd & Ors [2005] 1 LNS 92 ***(refd)***

Chin Cheen Foh v. Ong Tee Chew [2003] 2 CLJ 575 HC ***(refd)***

K Balasubraminiam, Liquidator for Kosmopolitan Credit & Leasing Sdn Bhd v. MBF Finance Bhd & Anor [2005] 1 CLJ 793 CA ***(refd)***

Kimlin Housing Development Sdn Bhd (Appointed Receiver & Manager) In Liquidation) v. Bank Bumiputra (M) Bhd & Ors [1997] 3 CLJ 274 SC ***(refd)***

Leon v. York-O-Matic Ltd & Ors [1966] 3 Ch D 277 ***(refd)***

Malayan Banking Bhd v. Lim Poh Ho & Anor [1997] 2 CLJ 516 CA ***(refd)***

MUI Bank Bhd v. Cheam Kim Yu [1992] 4 CLJ 2229; [1992] 1 CLJ (Rep) 222 SC ***(refd)***

Official Receiver and Provisional Liquidator of Maril-Rionebel (M) Sdn Bhd v. Anafartal Caddesi Sdn Bhd [2006] 2 CLJ 757 HC ***(refd)***

Re Equity Funds of Australia [1976-1977] 2 ACLR 238 ***(refd)***

Re Edennote Ltd Tottenham Hotspurs PLC and Others v. Ryman and Another [1995] 2 BCLC 248 ***(refd)***
Re Siromath [1991] 1 ACLC 587 ***(refd)***
Sarawak Timber Industry Development Corporation v. Borneo Pulp Plantation Sdn Bhd [2004] 8 CLJ 584 HC ***(refd)***
Sydlow v. TG Kotselas [1996] 14 ACLC 846 ***(refd)***
TN Metal Industries Sdn Bhd v. Ng Pyek Yew [1996] 4 MLJ 567 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 228(a), 232(8), 233, 236(1)(c), (2)(c), (3), 279, 355
Companies (Winding Up) Rules 1972, rr. 48, 63, 194
National Land Code, s. 349

For the applicant - Dennis Xavier; M/s Dennis Xavier & Assoc
For the liquidator - Gregory Ling Lee Yi; M/s Ranjit Ooi & Robeert Low
For HSBC - Ang Lay Ling; M/s Benjamin Dawson
For the 2nd respondent - N Eliatamby; M/s WC Chan & Roy
For the petitioner - Kenny Lee; M/s Kenny Lee, Chong & Assoc

Reported by Suhainah Wahiduddin

JUDGMENT

Ramly Ali J:

[1] This grounds of judgment are in respect of the notice of motion dated 27 December 2005 (encl. 37) filed by one Ong Weng Seng @ Ong Say Lan (applicant) a contributory and former director of the 1st respondent (the company under liquidation).

[2] By encl. 37, the applicant seeks the following prayers:

(a) an order that the sale of the land held under Lot. No. 726 P.N. No. 7225 and Lot No. 727, P.N. No. 7224, Section 8, Petaling Jaya (collectively referred to hereinafter as the "said land") by the liquidator to Idaman Harmoni Sdn. Bhd (the 2nd respondent) be set aside; and

(b) alternatively, that the applicant be given leave to commence proceedings to set aside the sale of the said land.

Background Facts

[3] The 1st respondent is a company incorporated in Malaysia, and was in the principal activity of property development.

[4] On 27 July 1999, the 1st respondent was wound-up by this court, pursuant to a winding-up petition presented by Abric Project Management Sdn. Bhd. ("petitioner") in respect of a debt of RM2,000,000.

[5] Pursuant to the winding-up order, one Lim Tian Huat was appointed as the liquidator over the 1st respondent ("the liquidator").

[6] The 1st respondent had no assets of realisable value at the date of the winding-up order other than two (2) pieces of immovable properties, namely:

(a) the said land; and

(b) a single storey terrace house located at No. 1, Jalan 8/18, Taman Toman, Petaling Jaya, Selangor Darul Ehsan, situated beside the said land.

[7] The said land was subject to a registered legal charge in favour of HSBC totaling RM33,000,000 as security for a term loan facility of RM28,000,000 and an overdraft facility of RM5,000,000 granted by HSBC to the 1st respondent.

[8] On 3 August 1999, the liquidator notified the applicant of his appointment and requested for the applicant to furnish the statement of affairs. The statement of affairs was never provided. As part of the liquidator's duties, the liquidator began the process of realising the assets of the 1st respondent by taking steps to sell the properties. Eventually, on or about 3 June 2003, the said land and single storey terrace property were sold to the 2nd respondent for purchase prices of RM17,900,000 and RM100,000 respectively. The sale and purchase agreement ("SPA") for the sale and purchase of the said land and the single storey terrace property respectively, became absolute and binding upon the 1st respondent on or about 27 August 2003.

[9] The sale and transfer was eventually completed on or about 24 November 2003 wherein the discharge of charge dated 24 November 2003 was released by HSBC in return for the payment of the full RM17,900,000 directly to HSBC. The said land was registered in the 2nd respondent's name on 27 November 2003.

[10] On 18 September 2003, the applicant's solicitors wrote to the liquidator with a proposal that a suit be instituted against HSBC for an alleged breach of contract. No query made as to the status of the said land.

[11] On 22 October 2003, the liquidator's representatives met with the applicant and his solicitors to discuss the proposed cause of action against HSBC for a claim in damages for breach of contract. No query was raised as to the status of the said land. On 25 May 2004, the applicant instituted proceedings *inter alia*, for this court to allow the applicant to use the name of the 1st respondent to institute a suit against HSBC. On 26 October 2004, this court allowed the applicant to use the name of the 1st respondent to initiate a suit against HSBC subject to certain express order.

[12] On 14 March 2005, the writ of summons and statement of claim was filed claiming damages against HSBC *vide* the Kuala Lumpur High Court Civil Suit No. D5-22-343-2005.

[13] On 27 December 2005, encl. 37 was filed by the applicant.

Chronology Of Steps Taken By The Liquidator Leading To The Sale Of The Said Land

[14] A summary of the steps undertaken by the liquidator leading to the sale of the said land is set out below:

(a) by a letter dated 25 August 1999, the liquidator sought the assistance of Pacific Landmark Real Estate Agents ("PL Estate Agents") to look for prospective purchaser for the properties;

(b) on 10 September 1999, the liquidator engaged Messrs Colliers, Jordan Lee & Jaafar ("Colliers") to perform a valuation on the properties to obtain the indicative open market value and forced sale value of the properties collectively. On 27 September 1999, Colliers reverted with the indicative market value of the properties to be at RM28,000,000, for liquidation purposes. The formal report and valuation dated 21 September 1999 by Colliers was subsequently provided, setting out the basis for the valuation at RM28,000,000;

(c) on 20 September 1999, the liquidator advertised the properties for sale in "The Star" newspaper on a strictly "as is where is" basis. The advertisement stated that an information memorandum had been prepared and was available for

purchase. Those interested were instructed to respond by 5pm, 11 October 1999 by submitting a formal offer in writing, enclosing a cashier's order/bank draft for 2% of the offer price as earnest money. By 11 October 1999, there was no response to the advertisement;

(d) from the last quarter of 1999 until the eventual sale of the properties on or about 3 June 2003, various reputable and established estate agents were engaged by the liquidator to assist him in the selling of the properties;

(e) sometime in December 1999, the liquidator was contracted by Messrs F. L. Foo & Co. who informed him that they had a foreign client who was interested in purchasing the said land for RM170 per square feet (a total of approximately RM27,000,000). In light of the valuation of RM28,000,000, the liquidator rejected the offer as being too low;

(f) Messrs F. L. Foo & Co. then reverted with a revised offer of RM180 per square feet (a total of approximately RM28,760,000) for the said land;

(g) in the meantime, the liquidator issued letter to ie, PL Estate Agents and Raine Home International Zaki & Partners ("Raine Home") on 3 March 2000, appointing them as agents for the sale of the properties on a non-exclusive basis;

(h) on or about 8 March 2000, the liquidator received an offer via PL Estate Agents from Merge Energy Bhd. ("MEB") that MEB or its nominee was interested in purchasing the said land for RM31,500,000;

(i) in view of the offer from MEB, the liquidator decided to reject the revised offer of RM28,760,000 by Messrs. F. L. Foo & Co. and concentrated on negotiations with MEB via PL Estate Agents;

(j) on 24 March 2000, MEB revised their offer to RM33,000,000;

(k) meanwhile, the liquidator was also in continued negotiations with Messrs. F. L. Foo & Co.'s client and on 14 April 2000, the client agreed to revise their offer to RM35,000,000;

(l) on 12 May 2000, the liquidator wrote to Messrs. F. L. Foo & Co. accepting the offer of RM35,000,000. Unfortunately, Messrs. F. L. Foo & Co., failed to revert to the liquidator;

(m) the liquidator then proceeded to negotiate with MEB in relation to their RM33,000,000 offer, as they had not stipulated any deadline to revert;

(n) on 23 May 2000, the liquidator wrote to PL Estate Agents to accept the RM33,000,000 offer by MEB;

(o) several extensions were granted to MEB (via PL Estate Agents) as further negotiations proceeded between the liquidator and MEB. On 8 June 2000, the liquidator revised the term and conditions to the letter of acceptance of the offer and issued a revised letter of acceptance of the offer to MEB. Unfortunately, MEB failed to revert on the liquidator's revised letter of acceptance of the offer despite reminders;

(p) the liquidator then proceeded with negotiations with Messrs. F. L. Foo & Co.'s client and a letter dated 5 December 2000 was issued. Unfortunately, no positive outcome came out of this despite extensions being given;

(q) the liquidator then received a new offer (again via PL Estate Agents) from Selegic Tower Sdn. Bhd. ("STSB") to purchase the said land for RM31,000,000 sometime in January 2001;

(r) interest in said land dwindled in 2001 and so the liquidator engaged further reputable and established estate agents in the form of Appolo Realty on 5 July 2001 and Henry Butcher Real Estate Sdn. Bhd. ("Henry Butcher") on 27 August 2001.

(s) unfortunately, the market for commercial properties appeared to be low and therefore, on 28 January 2002, the liquidator again attempted to resume negotiations with Messrs. F. L. Foo & Co. as to their client's interest in the said land but nothing came out of this;

(t) on 8 May 2002, the liquidator received an offer (via Henry Butcher) from a client of Messrs Henry Lim & Co. to purchase the said Land for RM25,000,000. On 10 May 2002, the liquidator replied to Henry Butcher requesting Messrs Henry Lim & Co.'s client to revert with a formal offer enclosing a deposit of 2% of the offer price;

(u) on 28 June 2002, after further negotiations, the liquidator wrote to Messrs Henry Lim & Co., accepting their client's offer to purchase the said land. Unfortunately, the liquidator received no response;

(v) on 8 July 2002, the liquidator wrote to the directors of the 1st respondent (which includes the applicant) inquiring whether they wanted to make an offer for the said land. No response was received;

(w) on 19 December 2002, the liquidator received an offer (via Henry Butcher) from Messrs Henry Lim & Co. for and on behalf of their client, Messrs OSK Properties Berhad ("OSK") to purchase the said land for RM17,000,000. This time, earnest monies amounting to RM340,000,00 was forwarded. This offer was not immediately accepted and the liquidator sought for other further offers;

(x) on 16 April 2003, the liquidator received an offer from United Alliance Estate Agent, acting for one Messrs Modern Peak Sdn. Bhd. ("Modern Peak") to purchase the said land for RM12,000,000. Enclosed with the offer was a bank draft for the sum of RM240,000,00 being an earnest deposit; and

(y) subsequently, the liquidator received an offer from the 2nd respondent to purchase the said land for RM17,900,000. As this offer was the highest serious offer obtainable, the liquidator sought the consent of HSBC being the registered chargee over the said land as to the sale consented to the purchase price and agreed to discharge the charge over the said land for the redemption amount of RM17,900,000, being the total purchase price for the said land. The liquidator then accepted the offer and this led to the signing of the SPA with the 2nd respondent on 3 June 2003.

[15] The applicant attempts to challenge the sale by the liquidator of the said land on six (6) alleged grounds, namely:

(a) the said land is subject to a charge, therefore the liquidator has in law no power to sell;

(b) the authority of the court has to be obtained under s. 236(1)(c) of the Companies Act 1965 to effect the sale of the said land;

A (c) the sale of the said land was grossly undervalue;

(d) pursuant to s. 228(a) of the Companies Act 1965, the liquidator had no capacity to enter into a sale of the said land;

B (e) the transfer of the said land is defective and/or void as the legal title was not vested in the liquidator prior to the sale; and

(f) the 2nd respondent is not a *bona fide* purchaser for valuable consideration.

C

Findings Of The Court

[16] At the outset, it is observed that it is unclear as to what provision/s the applicant seeks to move this court. In fact, it is not stipulated anywhere in encl. 37, or for that matter, in any the supporting affidavits of the applicant, under which provision/s the applicant seeks relief. It is therefore uncertain as to what case the liquidator and the other parties are required to meet/answer. This amounts to a failure on a point of practice and procedure where it is a fundamental principle that a party must not take his opponent by surprise. It is incumbent upon the applicant herein to state with sufficient particularity, either in the heading or the body of encl. 37, as to the statute or rule under which this court is moved. As a result, all the other parties as well as the court are extremely prejudiced in having to contemplate the action taken by the applicant.

[17] Without derogating from the above, it appears from encl. 37 that the applicant seeks, in his capacity as a contributory, to move this court to interfere into the conduct of the liquidation by setting aside the sale of the said land by the liquidator.

[18] In support of encl. 37, the applicant initially attacked the conduct of the liquidator in the liquidation. He alleges "a complete failure or incompetence on the part of the liquidator in the exercise of his duties" and threatens the initiation of removal proceedings. His main grievances centered upon alleged acts and/or omissions of the liquidator leading to and/or in relation to the sale of the said land, arguing that the said land was sold at a gross undervalue.

[19] The applicant then goes a step further, launching a vicious assault directly against the liquidator, alleging concealment of facts from him and that the liquidator was colluding with HSBC to the detriment of the 1st respondent, its creditors and contributories. The applicant even alleges "a want of good faith on the part of the liquidator" in his conduct.

[20] Such allegations are serious allegations directed against the liquidator personally. Accordingly, before looking at the applicable law, it is necessary to first consider, in light of the personal attacks directed at the liquidator, whether leave of court is necessary.

Leave Of Court Required

[21] By encl. 37, the alternative prayer sought by the applicant is that the applicant be given leave to commence proceedings to set aside the sale of the said land.

[22] The applicant takes the liquidator to task in the latter's role in the sale of the property. He has made the most scathing attack against the liquidator contending *inter alia* that the liquidator has not acted in good faith, was in breach of his duty of care, acted in collusion with HSBC and had sold the property at gross undervalue. The applicant also contends that the purchaser is not a purchaser in good faith and for valuable consideration.

[23] It is the act and conduct of the liquidator in the discharge of the duties of his office, which are sought to be impeached by the applicant in this motion. The thrust of the applicant's case is that the liquidator was in breach of his duty of care owed to the 1st respondent in the sale of the property.

[24] Therefore in reality the action proposed by the applicant against the liquidator is in respect of the performance of his official duties. The liquidator however is an officer of the court. Rule 63, of the Companies (Winding Up) Rules 1972 is clear on this point. The court will not permit its officer to be sued without investigation of the merits of the case. Thus leave of court is necessary before such an action can be commenced. In *Chi Liung Holdings Sdn. Bhd. v. Ng Pyak Yeow* [1995] 4 CLJ 11, the Court of Appeal held that:

> ... it is clear that a Liquidator having been appointed by the Court, is an officer of the Court. It goes without saying leave of Court is needed before an action is commenced against him and officers like him.

[25] The case of *Leon v. York-O-Matic Ltd. And Others* [1966] 3 Ch. D 277, also appears to suggest that prior leave of the Companies Court had been obtained notwithstanding that no accusation of *mala fide* were directed at the liquidator therein.

[26] In this respect, the court is also in full agreement with Abdul Malik Ishak J in *Chin Cheen Foh v. Ong Tee Chew* [2003] 2 CLJ 575 where in His Lordship held that:

> Before bringing an action against the Defendant who was an officer of the Court by virtue of his position as a Court appointed provisional Liquidator, the Plaintiff should first obtain leave of the winding-up Court ... as a Court appointed provisional Liquidator, the Defendant is an officer of the Court and the Court will jealously protect him ... .

[27] In any event, the applicant himself appears to recognize the need for leave *vide* his alternative prayer in encl. 37.

Prima Facie Case Required Before Leave Is Granted

[28] In ascertaining whether leave ought to be granted, the court has to satisfy itself that there is no wrongful interference in the liquidation process. The court will not allow the liquidator to be subjected to unnecessary litigation or for a winding-up process to be wrongfully impeded. One way in which the court achieves this is by requiring the grant of leave before an action can be brought against a liquidator. This was made clear in the Australian case of *Sydlow v. TG. Kotselas* [1996] 14 ACLC 846 at p. 852 where it was held:

> ... the Court must protect the integrity of the winding-up under its supervision and control, by taking appropriate steps to prevent any proceedings or conduct which will wrongly impede that process. One way in which this can be carried out is to require the grant of leave by the Court in respect of any action against an official Liquidator, so that the Court can satisfy itself that there is no wrongful interference with the process.

[29] The control by the court over the circumstances in which, and the extent to which, its own officers are to be subjected to personal liability in respect of their activities in the course of the performance of their official duties falls clearly within the concept of the protection by the court of its own process. (see: *Re Siromath* [1991] 1 ACLC 587).

[30] Therefore, before leave could be granted, the court must be satisfied that there is sufficient *prima facie* evidence to support any allegation made against the liquidator. The court finds support in the decision of the High Court in *TN Metal Industries Sdn. Bhd. v. Ng Pyek Yew* [1996] 4 MLJ 567 where it was held:

> His task is an onerous one. He is charged with a number of statutory duties ... He is open to accusations of impropriety, unfairness, and any label that a disgruntled party might level against him. He ought to be protected against such abuse unless here is sufficient *prima facie* evidence to support such allegation. If any dissatisfied litigant is allowed to merely raise some issue and insist that on such mere allegation he be given leave to bring an action against a Liquidator, then the wheels of justice, which at the moment grind extremely slowly, will in such circumstance come to a halt. No one will venture towards this task. A Liquidator will spend all his time defending every action filed against him. He will then have to have professional indemnity insurance cover to protect himself against multifarious actions. Costs will escalate and his fees will have to be fixed.

[31] In *Sarawak Timber Industry Development Corporation v. Borneo Pulp Plantation Sdn. Bhd.* [2004] 8 CLJ 584, it was ruled that when misfeasance proceedings are brought, it is necessary for the applicant not only prove his allegations but also necessitates him to prove pecuniary loss to the company.

Applicable Provisions Of Law

[32] Before descending into the merits (or lack thereof) of encl. 37, it is necessary for us to consider the possible applicable provisions of law.

[33] Upon the winding-up of a company, it is trite that the liquidator is expected to wind-up the affairs of the 1st respondent. In doing so, the liquidator would have to realise the assets of the 1st respondent and collect proceeds therefrom, if any, for distribution to the 1st respondents creditors and thereafter, if there is a balance, to the contributories.

[34] The liquidator is empowered under s. 236(2)(c) of the Companies Act 1965 ("CA") to use his discretion when selling movable or immovable property of the company in liquidation. At all material times, this discretion is subject to the control of the court as provided in s. 236(3) of the Companies Act 1965 which states:

A the exercise by the Liquidator of the power conferred by this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.

B **[35]** It is also stated in s. 279 of the same Act that:

any person aggrieved by any act or decision of the Liquidator may apply to the Court which may confirm reverse or modify the act or decision complained of and make such order as it thinks just.

C **[36]** By reason of the lack of particularisation in encl. 37, one can only surmise that as a contributory, the applicant seeks to challenge the decision of the liquidator in selling the said land under these provisions.

D **[37]** In this regard, the case of *Chin Ah Keow @ Chin Lai Sitt v. Anggun Pintas Sdn. Bhd. & 3 Ors* [2005] 1 LNS 92 appears to be relevant to the present facts. In that case, the plaintiff had also sought to challenge the decision of the liquidators (2nd and 3rd defendants) appointed over the 1st defendant, in accepting a E tender submitted by the 4th defendant pursuant to s. 279 of the Companies Act 1965. In arriving at its decision as to the test to be met, the court referred to the following cases with approval:

(a) In *Re Edennote Ltd. Tottenham Hotspurs PLC and Others v.* F *Ryman and Another* [1995] 2 BCLC 248 where it was held that the court could only interfere with the exercise of a liquidator's decision to sell the assets of an insolvent company in very exceptional circumstances and would not do so unless it could be shown that the liquidator had acted utterly G unreasonably or, though acting in good faith took into account considerations which he ought not to have taken into account or failed to take into account considerations which he ought to have taken into account;

H (b) In *Re Equity Funds of Australia (in Liq)* (1976-1977) 2 ACLR 238, where his Lordship Bowen CJ applied a similar test when he held:

in my view, the test to be applied under section 279 is similar to that applying to the exercise of discretion which I is committed by statute to some particular official. The principles applied by the Court in such cases are reasonably well settled. The Court will recognise that discretion has been vested by the statute in the Liquidator and will not

> interfere unless it is shown that he did not address himself to the correct question or that he made errors of law or that he failed to take into account relevant matters or that he took into account irrelevant matters, to which may be added that if his decision in the circumstances appears such that no reasonable man could arrive at it, the Court will interfere ...

[38] Basically, the court should be slow to interfere with any act or decision of the liquidator in discharging their roles in company's liquidation particularly in matters involving sale of company's assets which involve commercial considerations. The court can only interfere in very exceptional circumstances when the liquidator has acted utter unreasonably.

Court's Observations On The Applicant's Application In encl. 37

[39] The court shall now deal with all the six (6) grounds submitted by the applicant to supports this application in encl. 37, one by one.

The Said Land Is Subject To A Charge, Thus The Liquidator Has In Law No Power To Sell

[40] Here, the applicant seeks to advance the proposition that in the case of a company in liquidation, the liquidator is powerless to sell property if it is subject to a charge. With regards to this allegation, the court finds that the liquidator is embarrassed and surprised, as this purported issue was never raised in either the applicant's application (which was devoid of particularisation as to its focus) or its supporting affidavits. The applicant should not be allowed to conduct its case surreptitiously without allowing a chance for a proper response.

[41] In any event, with respect, this argument is critically flawed and/or misconceived.

[42] The 1st respondent company is being under liquidation. The following is apparent and clear:

(a) the liquidator, who was appointed by this court, takes control of the 1st respondent pursuant to the winding-up order;

(b) the liquidator is tasked with statutory duties and responsibilities to wind-up the 1st respondent and dissolve the 1st respondent; and

(c) in doing so the liquidator would have to realise its assets to obtain proceeds to repay its creditors. The sale of the said land was therefore pursuant to such duties and responsibilities.

[43] It is patently trite that in accordance with the abovementioned duties, the liquidator is empowered to sell property belonging to the 1st respondent and this is entrenched in s. 236(2(c) of the Companies Act 1965 which states:

> the Liquidator may sell the immovable and movable property ... of the company by public action, public tender or private contract with power to transfer the whole thereof in any person or company or to sell the same in parcels.

Section 236(2)(c) also dispels any doubt as to whether the sale can be done by the liquidator by way of a private treaty and/or whether the liquidator must obtain court sanction before proceeding. Clearly, the liquidator can do so without having to obtain court sanction prior to the sale.

The position remains unchanged even if the property were to be subject to a registered charge. The liquidator can still sell the property, but always subject to the rights of the chargee (HSBC). Under the Torren system practiced in Malaysia the law and mechanisms put in place, polices itself:

(a) a chargor may try to sell the property with consulting the chargee but the property being subject to the registered charge, can never be sold free of encumbrances. Accordingly, no right-minded purchaser would buy the property subject to such an encumbrance;

(b) the chargor therefore has to liaise with the chargee to obtain its consent to a sale in order that the chargee issues a discharge of charge to uplift the charge; and

(c) The chargee itself would also insist on protecting its own interest. After all, the charge was granted to the chargee as security. By reason of the chargor's default, there is an outstanding sum payable to the chargee and the right to exercise the security is activated. The chargee could opt to sell the property or it could allow the chargor to sell the property. By choosing the latter, the chargee would invariably only grant its consent subject to the proceeds of the sale being paid

directly to it to offset the outstanding sums. If the proceeds of sale were higher than the outstanding sum, that portion would be paid directly to the chargor. This is in no way unfair and/or unusual.

[44] What the applicant is suggesting here cannot hold water. If one were to lead his proposition to its conclusion, the liquidator would have to sit put and cross its hands, being powerless on its own to sell the said land and therefore unable to complete the liquidation of the 1st respondent. This could never have been the intent of Parliament and/or common law.

[45] The applicant reliance upon the case of *Kimlim Housing Development Sdn. Bhd. (Appointed Receiver & Manager) In Liquidation) v. Bank Bumiputra (M) Bhd. & Ors* [1997] 3 CLJ 274, is completely misplaced, on the following grounds:

(a) nowhere in that case, did the Supreme Court forward such a proposition that a liquidator could not sell land subject to a charge;

(b) the facts of the case of Kimlim are entirely different to facts herein. The case of Kimlim dealt with a situation where a chargee, acting through receivers and managers, who was intending to sell a piece of immovable property belonging to the chargor without having to undertake a judicial sale under the provisions of the National Land Code (NLC). The chargor later was wound-up and the liquidator in that case was opposing the intended sale;

(c) therefore the case of Kimlim is authority for the proposition that a chargee, acting though receivers and managers, cannot waive, bypass or contract out of the provisions of the NLC when seeking to sell the charged property. It was held under those facts that the chargee should have proceeded with a judicial sale in accordance with the procedure laid down in the NLC;

(d) on the contrary, here, it was not the chargee, ie, HSBC, who had sold the said land, rather, it was sold by the liquidator himself, and therefore the sale was conducted by him for and on behalf of the chargor; and

(e) further, unlike in the case of Kimlim, here, there is no tussle between the liquidator and receivers and managers appointed under a debenture extended to the chargee. Under the present facts, there is no receivers and managers to talk of, rather, it was a simple and direct sale by the 1st respondent, acting through the liquidator, to a *bona fide* 3rd party purchaser for valuable consideration (2nd respondent) where the chargee (HSBC), had consented to the sale and provided a discharge of charge.

Authority Of Court Has To Be Obtained Under s. 236(1)(c) Of The Companies Act 1965

[46] In his submissions, the applicant argues that the sale amounted to a compromise or arrangement between the liquidator and HSBC and failure to obtain leave or sanction of the court under s. 236(1)(c) and in the absence of the committee of inspection, the non-compliance or breach of the Act and Winding-Up Rules renders the sale void.

[47] Section 236(1)(c) provides that the liquidator may with the authority either of the court or of the committee of inspection – "make any compromise or arrangement with creditors or person claiming to be creditors ..."

[48] The court is of the view that the sale transaction in the present case cannot amount to a compromise or arrangement as envisaged under s. 236(1)(c) of the Companies Act 1965. First, HSBC is not in the same position as that of all the other creditors under the liquidation. Instead, HSBC is a secured creditor; in that HSBC holds a registered charge over the said land and therefore takes priority over the proceeds from its sale. Secondly, cl. 4 of the sale and purchase agreement with regards to the payment of the purchase price does not in any way imply a compromise. As stated above, the said land is subject to a charge in favour of HSBC totaling RM33,000,000 as security for facilities rendered to the 1st respondent by HSBC. Before the said land can be sold free of encumbrances, a discharge of charge would have to be given by HSBC. Payment of the purchase price proceeds directly to HSBC was the only way in which HSBC would consent to the sale. The sale was conducted within the powers extended in s. 236(2)(c) of the Companies Act 1965, wherein prior court sanction is not required.

[49] Further, provisions for a refund in the event of a termination, is a standard term in sale and purchase agreement. If not, no purchaser would pay earnest money without a safety net ensuring that it would be returned should for any reason the sale be terminated on no fault of any party.

[50] In any event, here, the total proceeds of sale fell clearly short of fully repaying the outstanding amount owed to HSBC. As a secured creditor, HSBC, would have priority over the proceeds of sale of the charged property.

[51] The liquidator was in no way colluding with HSBC. In short, the liquidator had a job to do, ie, to wind-up the 1st respondent. Before this could be completed, the liquidator would have to realise the said land. If not, the liquidation could never be completed. The liquidator opted to perform the sale and he was empowered to do so under s. 236(2)(c) of the Companies Act 1965 as long as he had HSBC's consent. Therefore this ground cannot support the applicant's application in encl. 37.

Sale Of The Said Land Was Grossly Undervalue

[52] The applicant was given the prior opportunity by the liquidator to make an offer for the said property. He was then certainly aware of the impending sale of the property. The applicant never chose to take an active part in the liquidation. In fact, the applicant had never showed any interest in the liquidation when requested to furnish the statement of affairs in his capacity as a director of the 1st respondent company, he failed to do so. He has not denied knowledge of the advertisement for the sale of the property placed by the liquidator in "The Star" newspaper on 20 September 1999 as well as signboard put up on the property. He was given express notice by the liquidator of the sale by letter dated 8 July 2002. Nevertheless, the applicant now seeks to complain, after the event and in hindsight, that the purchase price RM17,900,000 was grossly undervalued.

[53] The applicant himself does not provide any alternatives to this court except that he "received inquiries from business associates who were interested in purchasing the land". This is not only a bare averment but offers nothing to show that there was a higher purchase price that could have been obtained for the said land. In fact, the applicant ought to be reprimanded for not

A sharing this with the liquidator so that the liquidator could have followed through on those alleged "inquiries". Instead, the applicant merely complains (without action) at the conduct of the liquidator.

B **[54]** The applicant vehemently argues that the said land had been originally purchased for RM34,500,000. The court cannot accept that argument because it is not only impractical but also unreliable to use the original purchase price as a gauge. The price suggested pertains to a sale conducted many years prior. Furthermore, the C consideration as to why such a price was paid are unknown, for example, the 1st respondent may have paid a premium by reason of its peculiar partiality towards the said land. We will never know and therefore the original price cannot be used as a point of reference.

D **[55]** The applicant then relies on a valuation report dated 23 June 1997 by Messrs. CH Williams Tahar & Wong ("CH Williams") stipulating a valuation of RM73,000,000 and an updated Certificate of Valuation by CH Williams dated 20 March 1998 revising the valuation at RM60,000,000. The abovementioned E valuations cannot be used as:

(a) the were grossly outdated, having been prepared over five years prior to the date the said land was sold to the 2nd respondent;

F

(b) they were not prepared for the purposes of a sale, rather for "internal management purposes". This is admitted by the applicant in his 2nd affidavit; and

G (c) most importantly, they took consideration "assumptions not yet realised" ie, that a development was completed on the said land. In actual fact, the development was never built and the said land remained a vacant plot of land when it was finally sold to the 2nd respondent.

H **[56]** Upon realising the above, the applicant then produced a new valuation report dated 18 May 2006, apparently abandoning the abovementioned valuations. This time, the applicant claimed that the actual price obtainable on 3 June 2003 was RM30,000,000.

I

[57] This court is faced with conflicting situation. On one hand, there is a valuation for RM30,00,000. The liquidator himself supplied a valuation providing the amount of RM28,00,000. On the other hand, the only serious offers received by the liquidator were from OSK Properties Berhad (an offer for RM17,000,000), Modern Peak Sdn. Bhd. (an offer for RM12,000,000) and the 2nd respondent (an offer for RM17,900,000).

[58] The decision of the Court of Appeal in *Malayan Banking Bhd. v. Lim Poh Ho & Anor* [1997] 2 CLJ 516 answer this quandary, wherein it was held that "the true commercial value of a property is not what a valuer thought it should be, but the actual price that the property would fetch on the open market". In fact, the *Malayan Banking Bhd.* case *(supra)* is authority to suggest that the applicant cannot merely complain without having taken any action or provided any proof that the liquidator acted fraudulently or unreasonably.

[59] Other material considerations were taken into account by the liquidator before he sold the said land at RM17,900,000 to the 2nd respondent;

(a) the said land was leasehold land having a remainder of less than 66 years remaining of the lease (it would expire on or about 4 January 2069) and therefore the longer he delayed in its disposal, the greater the likelihood the price would continue to drop. It was clear from the offers made that the price was dropping due to this reason. Even from the valuations exhibited by the applicant, the said land was originally valued at RM73,000,000 before it dropped to RM60,000,000 within less than a year.;

(b) prospective purchasers would also have to consider additional expenses to extend the lease to 99 years;

(c) the said land was severely restricted in terms of its access. Accordingly, the Single Storey Terrace Property had to be sold together so that it could be demolished to offer an easier access. A ramp would have to be built to access the said land. This required additional expenditure; and

A (d) the 'softness' of the market for commercial properties. A close look at the valuation report of Messrs. CH Williams dated 18 May 2006 (as tendered by the applicant) there was scarce or no interest buyer for the property in 2003. For the entire year of 2003, there was only one (1) transaction
B involving commercial land recorded in Petaling Jaya.

[60] The applicant also suggests that the liquidator ought to have pursued a sale to HSBC for RM40,000,000. This is plain absurd as not only was this offer made way back in 1998, HSBC later
C had specifically stated in its letter dated 10 June 1999, that HSBC "no longer wish to continue negotiations ..." Accordingly, the offer was withdrawn by HSBC.

[61] The applicant does not desist and argues that the said land
D ought to have been sold by public tender or public auction. He further alleges insufficient advertising and that the liquidator had failed to obtain an updated valuation just prior to selling. This, the applicant easily says in hindsight, however, the applicant fails to appreciate the situation faced by the liquidator at that material
E time.

[62] In this respect, the liquidator cannot please everyone. The liquidator is required to juggle between escalating expenses in having to dispose of the said land, in terms of obtaining valuations which are expensive and paying for advertising costs and on the
F other hand, adequately pacing the said land in the market. Moreover, the liquidator faced limited funding as the properties amounted to the only major assets of realisable value. The applicant cannot expect the world without having pitched in to fund the disposal.
G

[63] Here, first and foremost, a tender was performed by advertisement but proved worthless as no one responded. The said land, being a huge vacant plot of land, was not an ordinary piece of property. Those interested would have to have vast
H resources, not only to pay for the land but also to develop it.

[64] Therefore, the liquidator decide to approach reputable professional estate agents to source for potential buyers. This proved to be cost efficient as no advance payments were
I necessary and the prospect of gaining the commission would drive the estate agents to actively search for a buyer. In turn, the liquidator benefited for the wealth of contacts, marketing networks,

expertise and resources available to the estate agents. Further, these estate agents would place signboards on the said land and advertise through publications and leaflets at their own costs. As can be seen, this method proved to be effective, as the estate agents had introduced many prospective purchasers.

[65] Consequent to the above, the conduct of the liquidator was not unreasonable or absurd. Instead, it was in line with the circumstances faced at that material time. As can be seen from the steps undertaken as act out above, the liquidator was at all material time acting reasonably and *bona fide* in searching for the best price obtainable for the said land under the circumstances.

[66] In support of this finding, the court relies on the case of *Leon v. York-O-Matic Ltd & Ors* [1966] 3 All ER 277, as an authority that it is for the applicant to satisfy this court with credible and concrete evidence that the liquidator was unreasonable of his action or he was acting in a manner in which no reasonable liquidator could act; if the applicant fail to do so, the court ought not exercise its power to interfere.

Pursuant To s. 228(a) Of The Companies Act 1965, The Liquidator Had No Capacity To Enter Into A Sale

[67] The applicant alleges that the liquidator had no capacity to enter into the sale of the said land as he had failed to provide the requisite security deposit to the official receiver pursuant to s. 228 of the Companies Act 1965. By this, the applicant alleges that the appointment of the liquidator is flawed and any act performed thereon is void, including the sale.

[68] The evidence shows that it is not that the liquidator blatantly omitted to provide the security deposit rather he had originally applied to the official receiver for a waiver of the security deposit *via* a letter dated 10 August 1998. The official receiver did not respond until 8 July 2003 (which was in any event after the SPA for the said land was entered into) and even then the official receiver had issued the letter dated 8 July 2003 to the wrong address. The liquidator had since shifted to a new address and this had been notified to the official receiver via the required Form 73 (notice of change in situation of office of liquidator). Accordingly, the liquidator never received the official receiver's letter.

[69] The liquidator has since attempted to settle the security deposit but the official receiver has refused to accept. In any case, the court is of the view that the lack of provision of the security deposit is a mere omission and is capable of validation by this court pursuant to s. 355 of the Companies Act 1965 and/or r. 194 the Companies (Winding-Up) Rules 1972. No substantial injustice was caused to the 1st respondent or the applicant by virtue of this omission.

[70] In any case, s. 232(8) of the Companies Act 1965 provides "subject this Act the acts of a liquidator shall be valid notwithstanding any defects that any afterwards be discovered in his appointment or qualification". This provision was placed in the Companies Act 1965 to ensure that justice would be maintained and that the acts taken by a liquidator in the best interest of a company in liquidation cannot later be set aside merely by reason of any defect in his appointment.

[71] Further, the liquidator has just filed the liquidator's 4th affidavit in reply (affirmed on 22 January 2006) wherein it is provided that the official receiver has just issued the 'Certificate that Liquidator or Special Manager Has Given Security" in Form 21 on 21 November 2006 confirming that the security deposit has been duly paid. The official receiver therefore does not wish to penalise the liquidator under r. 48 of the Companies (Winding-Up) Rules 1972.

The Transfer Is Defective/Void As The Legal Title Was Not Vested In The Liquidator

[72] The applicant contends that the title of the property must first be vested in the liquidator's name as required under s. 233 of the Companies Act 1965 read together with s. 349 of the National Land Code 1965. The applicant further contends that the provisions of Bankruptcy Act shall apply.

[73] The applicant's contention that the title of the property must first be vested in the liquidator's name before he can deal with it is misconceived. With respect this argument stems from a failure to appreciate that the legal title of the property remains with the respondent and is not affected by its winding-up. Thus there is no necessity to vest the title of the property which is already in the name of the respondent. This is unlike the estate of a bankrupt,

where upon the making of a receiving order, it is necessary to vest the estate of a bankrupt unto another person that is the official assignee under s. 349 of the National Land Code.

[74] In the present case, the said land was registered, at all material times, in the name of the 1st respondent. The sale and purchase agreement was therefore entered between the 1st respondent and the 2nd respondent. The liquidator signed the said agreement (SPA) in his capacity as liquidator appointed over the 1st respondent ie, as agent of the company and not in his personal capacity. The sale was conducted under s. 236(1)(c) of the Companies Act 1965.

[75] The interplay between s. 233 and s. 236(2) is well illustrated in *Official Receiver and Provisional Liquidator of Maril-Rionebel (M) Sdn. Bhd. (formerly known as Kredin Sdn. Bhd) v. Anafartal Caddesi Sdn. Bhd.* [2006] 2 CLJ 757.

The applicant in *Maril-Rionebel*'s case was the official receiver and liquidator of the company in liquidation. The respondent was the shareholder of the company. The company was the registered proprietor of 5 pieces of land. The liquidator entered into a sale and purchase transaction with a third part to dispose of the lands. The respondent entered private caveat on the lands preventing the liquidator from fulfilling its obligations under the sale and purchase transaction. The liquidator made an application to the court to have the caveats removed.

The respondent opposed the liquidator's application on the ground, *inter alia*, that the sale of the lands were invalid as the liquidator has failed to obtain an order from the court to vest the lands in the name of the liquidator pursuant to s. 233 prior to the sale.

The sale of the lands by the liquidator in *Maril-Rionebel*'s case was not construed as a compromise but merely a realisation of assets by the liquidator in carrying out its duty. Abdul Malik Ishak J in his judgment held that:

> ... it is clear as crystal that the very purpose of section 233 of the Companies Act 1965 is to essentially gather all the assets, landed or otherwise, for the purpose of putting them in the hand of the Liquidator. Here, the said lands are already registered in the name of the company in liquidation and therefore there is no

A need to vest the said lands or to put the said lands in the custody and control of the Liquidator because it is already in the custody and control of the Liquidator ... it is wrong to say that before the Liquidator can sell the said lands, the said lands must first vest in the Liquidator under section 233 of the Companies Act 1965. It is pointless to have section 236(2) of the Companies Act B 1965 as enacted by Parliament if this Court give effect to it. The qualified powers of a Liquidator are deliberately provided for under section 236(1) of the Companies Act 1965. And I venture to say, and it is my judgment, that the powers provided for under section 236(2)(a) or section 236(2)(c) of the Companies Act 1965 are not C in any way curtailed by section 233 of the same Act.

[76] It is a settled principle that the position of a liquidator in a winding-up is different from the official assignee in a bankruptcy situation. The House of Lords in *Ayerst v. C & K (Construction) Ltd.* [1976] AC 167 held that: D

On the making of a winding-up order:

(1) the custody and control of all the property and choses in action of the company are transferred from those persons who were entitled under the memorandum and articles to E manage is affairs on its behalf, to a Liquidator charged with the statutory duty of dealing with the company's assets in accordance with the statutory scheme (section 243). Any disposition of the property of the company otherwise than by the Liquidator is void (section 277).

F

(2) the statutory duty of the Liquidator is to collect the assets of the company and to apply them in discharge of its liabilities (section 257(a) ... In performing these duties in a compulsory winding-up the Liquidator acts as an officer of the Court ... The function of the Liquidator are thus similar G to those of a trustee (formerly official assignee) in bankruptcy or an executor in the administration of the estate of a deceased person. There is, however, this difference: that whereas the legal title in the property of the bankrupt vests in the trustees as the legal title to the property of the H deceased vests in the executor, a winding-up order does not of itself divest the company of the legal title to any of its assets ...

[77] Consistent with the above legal principles, s. 349 of the National Land Code is applicable only in a bankruptcy situation I and not in a winding-up. Section 349 reads as follows:

349 Registration of Official Assignee

(1) where the Official Assignee claims any land, or share or interest in land, under any written law for the time being in force relating to bankruptcy, he may apply to the Registrar under this section for the registration thereof in his name, and the registrar shall give effect to the application by endorsing a memorial of the transmission on the register document of title to the land in question or, as the case may be, the land in which the share or interest in question subsists.

(2) ...

(3) No land, share or interest shall vest in the Official Assignee under any adjudication of bankruptcy, or order for administration in bankruptcy, until it has become registered in his name pursuant to this section.

The 2nd Respondent Is Not A Bona Fide Purchaser For Valuable Consideration

[78] This contention by the applicant is clearly without merit and therefore unsustainable. Under this argument, the applicant first states that the sale was not for "valuable consideration". Nevertheless, nowhere does the applicant justify why the payment by the 2nd respondent did not amount to "valuable consideration". Here, payment of the full purchase price cannot be disputed and HSBC itself recognised the receipt of an amount of RM17,900,000 and released the discharge of charge.

[79] Related to this issue, the applicant also contends that the 2nd respondent was not a *bona fide* purchaser and the transaction was not at arms length because the 2nd respondent is a related party.

[80] The court cannot agree with this contention. At all material times the fact that the 2nd respondent was indirectly related to the 1st respondent was never concealed. In turn, the requisite announcements were made and the necessary approvals and waivers were obtained from the relevant regulatory bodies.

[81] Related party transactions are not prohibited in law. The fact is the law requires certain procedural steps to be complied with if the transaction falls within the category of a related party transaction. In this case full disclosure has been given to Bursa Saham Malaysia concerning the connection and shareholding

between a shareholder of the 1st respondent and the 2nd respondent. As can be seen the shareholder that holds a 25% direct share and a 25% indirect share in the respondent also holds a 6.29% share in MFCB who in turn holds a 55% share in the 2nd respondent. The connection between the 2 is minimal. In any case Bursa Saham Malaysia had exempted the 2nd respondent from complying with the usual requirements of obtaining approval at a shareholders meeting.

[82] Further it must be recalled that the liquidator entered into the sale and purchase agreement for the respondent as vendor. As can be seen the director concerned had not been involved with the deliberations in the proposed acquisitions. In light of the above the applicant's submission on related party transactions is a red herring.

Other Issues Raised

[83] The applicant also alleges that HSBC ought to have surrendered its security over the said land and filed a proof of debt.

[84] Once again the court cannot accept this allegation. The applicant is again under a mistaken understanding of the HSBC's position in the liquidation. HSBC is a secured creditor and is not obliged to submit a proof of debt (even when called upon to do so by the liquidator) if he relies upon his security for payment. He need only submit his proof of debt if he gives up his security and proves for the whole debt or if he decides to prove for the unsecured portion. There is no mandatory requirement for a secured creditor to come under the liquidation.

See: *K. Balasubraminiam, Liquidator for Kosmopolitan Credit & Leasing Sdn. Bhd. (In Liquidation) v. MBF Finance Bhd. & Anor* [2005] 1 CLJ 793.

[85] In mortgage transaction, the title of the mortgagor in respect of his property passes to the mortgagee. However, under the National Land Code, the chargee has only a security interest in the property. The chargor ie, the 1st respondent remains the legal proprietor of the property. The applicant has failed to appreciate the distinction between a mortgage and a charge.

[86] Therefore, as the legal owner of the property, the respondent has the capacity to enter into the sale with the purchaser through the liquidator. There is no necessity for HSBC to surrender the security to the liquidator as contended by the applicant, before the liquidator can deal with the property.

[87] It is axiomatic that no purchaser would acquire an encumbered property. For this reason, the vendor (the 1st respondent) who has an obligation to deliver the property free from encumbrances has first to seek the consent of the chargee (HSBC) for the sale and to fulfill the terms upon which consent of the chargee is given. In *MUI Bank Bhd. v. Cheam Kim Yu* [1992] 4 CLJ 2229; [1992] 1 CLJ (Rep) 222, Harun Hashim SCJ said:

> Under the Code, there is nothing to prevent a chargor with the consent of the chargee to sell the charged property by private treaty.

[88] Accordingly, the parties to the sale agreement, agreed that the purchase price which turn out to be an amount lesser that the debt owing by the 1st respondent to HSBC, be paid to HSBC to secure the discharge of the chargee. HSBC was and is entitled as of right to the redemption sum as the chargee and secured creditor of the property. The redemption sum had to be and was paid to HSBC in consideration of them giving up their security. It will thus be seen that the issue of non filing of the proof of debt raised by the applicant is irrelevant and misplaced.

Balance Of Justice

[89] The balance of justice is against the granting of the application in encl. 37. To set aside the sale of the said land would not be a commercially viable decision. It serves no good of the 1st respondent company as well as to the shareholders, and creditors.

[90] Since the purchase of the said land, the 2nd respondent has since proceeded to develop the said land:

(a) the 2nd respondent has entered to enter into a joint venture with IJM Properties Sdn. Bhd. ("IJM") develop the said land;

(b) the 2nd respondent applied and obtained approval for the extension of the leasehold tenure of the said land from 65 to 99 years and in doing so incurred the payment of RM6,551,938;

(c) construction works have commenced; and

(d) approximately 164 purchasers have entered into sale and purchase agreements for the purchase of development units comprised in the development.

[91] It would therefore cause great injustice not only to the 2nd respondent but also IJM and the many purchasers who have since entered into agreements to buy units. This is not a case in which the act of the liquidator can easily be reversed without grave consequences. Again, the applicant chose to awaken too late.

[92] The applicant who has all along shown no interest at all in the liquidation process and has still to date not filed the statement of affairs of the 1st respondent, has suddenly bestirred himself whilst a massive and prestigious mixed commercial development known as PJ8 is taking shape on the property in Petaling Jaya. The PJ8 project comprises of 1 block of 38 storey service suite, 1 block of 12 storey office suit and 2 blocks of office towers with 12 & 17 storey respectively. The setting aside of the sale of the property would have disastrous effect on the numerous purchasers of the units in this project and brings no benefit whatsoever to anyone including the applicant and the 1st respondent company.

[93] The applicant on the other hand is not an aggrieved party. There is no advantage or benefit to be gained from this motion. As it is even if the property had been sold at RM30 million, there will still be a deficiency of RM13.3 million to HSBC and no surplus whatsoever to the respondent or the applicant. In the final analysis, whatever the shortcomings (if any which is denied) of the liquidator, there is no prejudice to the respondent or the applicant or the creditors.

Unreasonable Delay

[94] There was clear delay in the filing of encl. 37. Enclosure 37 was only filed on 27 December 2005 where evidence suggests that the applicant knew of the sale of the said land at least as early as 20 August 2004.

[95] No reasons have been proffered by the applicant to explain a delay of almost one and a half years. Such a delay would be in itself, be grounds to refuse encl. 37. In the *Leon* case *(supra)*. Plowman J held "another ground for refusing the relief for which the plaintiff is asking in this motion is the matter of delay. It is clear from the evidence that the plaintiff knew before Christmas, 1965 ... the writ was not issued until Mar. I, that is to say, after a delay of over two months ..."

[96] As was the state of affairs in the *Leon* case *(supra)*, the liquidator here was dependent on the approval of HSBC in the sale of the said land. The fact that the said land was leasehold land exacerbated the issue, calling for the said land to be sold as soon as possible. The decision was made and the SPA was signed on 3 June 2003 with the consent of HSBC. It is therefore unreasonable for the applicant to have now awakened from his slumber over two and a half years later to begin to question and interfere with that decision with hindsight.

Conclusion

[97] The applicant has failed to establish a sufficient *prima facie* case against the liquidator to warrant interference of the court in the sale of the said land. Therefore the alternative prayer in encl. 37 for leave to commence proceedings to set aside the sale of the said land cannot be granted.

[98] Even on merit of the application, the applicant has also failed to meet the threshold required to justify the interference of the court to bring about a measure as extreme as setting aside the sale of the said land. In this respect:

(a) the applicant has failed to establish that the liquidator had not exercised his discretion *bona fide* or that he had acted in a way in which no reasonable liquidator could have acted;

(b) the balance of justice of the case is against the setting aside of the sale of the said land. In this regard, it would not be possible to return the said land to its original state in light of the ongoing development construction by the 2nd respondent. Further, there would be a devastating carry-over effect upon the interests of not only the 2nd respondent but also approximately 164 purchasers of units in the new development;

(c) there was unreasonable delay in the filing of encl. 37 to which the applicant has not and cannot explain; and

(d) the applicant failed to establish that he was aggrieved by the decision of the liquidator in selling the said land at RM17,900,000. Even taking the applicant's case at it's highest, the sale of the said land at the price of RM30,00,000 (as suggested by him) would still leave a deficit of approximately RM13,300,000 due to HSBC. No monies would flow back into the liquidation pool for distribution to the contributories. The applicant, as a contributory, is not aggrieved by the sale of the said land.

[99] Based on the foregoing, encl. 37 is dismissed with costs.